

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

6 LUIS LOPEZ-BIRRIEL,

7 Defendant.

Criminal No. 05-167 (JAF)

8 **O R D E R**

9  
10 The Motion for Reconsideration of a criminal sentence pursuant  
11 to Fed. R. Crim. P. 35(a), filed on February 13, 2006, Docket  
12 Document No. 67, is **DENIED**.

13 We have carefully examined the Criminal History Category for  
14 this Defendant and find, upon a reassessment of the same, that  
15 Defendant López-Birriel was properly sentenced at a Base Offense  
16 Level of 25, Criminal History Category IV, Guideline Sentencing Range  
17 of 84-105, to a total of 84 months.

18 Upon further review of the record and documents on file,  
19 including the Presentence Investigation Report (PSR), the Criminal  
20 History Category at the PSR will be corrected as follows:

### Criminal Convictions

| <u>Date of Arrest/<br/>Age</u> | <u>Charge/<br/>Agency</u>                                | <u>Date Sentence Imposed/<br/>Disposition</u>  | <u>Guideline/<br/>Score</u> |
|--------------------------------|--|--|-----------------------------|
| 22.                            | 11-01-89<br>Age: 25                                      | Attempted illegal appropriation  | §§4A1.1(a) and 4A1.2(k)     |
|                                | Cr. No.<br>KPD89G1660<br>Superior Court,<br>San Juan, PR | 02-20-90: Found guilty.<br>04-27-90: Sentenced to a term of imprisonment of one year and a half; sentence suspended and placed on probation.<br>08-20-91: Probation revoked.<br>12-18-91: Paroled.<br>05-05-92: Expiration date. | 3                           |

According to official court documents, the defendant aided and abetted by two others, without violence or intimidation illegally appropriated a 1982 Mazda valued at \$7,000, property of Raúl Rosario Berrios. The defendant was placed on probation for one year and a half, the conditions of which he violated by using cocaine. He was revoked on August 20, 1991, and paroled on December 18, 1991. His adjustment while incarcerated and during parole was described as satisfactory.

|     |          |  |                                  |           |
|-----|----------|--|----------------------------------|-----------|
| 23. | 09-21-95 | Misprision of a felony; 18                   | 05-23-95: Sentenced to 30 months | §4A1.1(a) |
|     | Age: 31  | U.S.C. § 4                                   | imprisonment and one             |           |
|     |          | Cr. No. 95-33-1(CCC)                         | year TSR.                        |           |
|     |          | U.S. District Court, District of Puerto Rico | 10-08-98: Expiration date.       | 3         |

According to the pre-sentence report prepared in this case, on September 1, 1994, the defendant along with two others aboard a vessel were apprehended after they were detected by a National Guard helicopter, throwing contraband overboard. The bales that were thrown overboard were later identified as containing a total of 382.25 kilograms of cocaine. He was represented by counsel.

Criminal No. 05-167 (JAF)

-3-

1 During defendant's term of supervised release, the  
 2 defendant tested positive to morphine on one occasion. He  
 3 was referred to a contract drug program, "Consultores  
 4 Psicológicos de Puerto Rico," for ambulatory drug  
 5 treatment, and remained within the same from March 7, 1996  
 6 to October 31, 1997. Since the defendant was taking  
 7 medication due to surgery, he was ordered to enter MEPSI,  
 8 a residential detoxification program, from August 11 to  
 9 August 17, 1998. The defendant was released from the  
 10 program, as he did not present further problems during  
 11 supervision, and was terminated satisfactorily.

|    |     |                         |  |  |           |   |
|----|-----|-------------------------|--|--|-----------|---|
| 12 | 24. | 11-22-<br>98<br>Age: 33 | (1) PR Weapons<br>Law Violation<br>to Art. 6<br>Cr. No.<br>KLA99M0175<br>(2) Aggravated<br>Assault Art.<br>95 PR Penal<br>Code<br>Cr. No.<br>KIC99G0015<br>(3) PR Weapons<br>Law Violation<br>to Art. 7<br>Cr. No.<br>KLA99G0220<br>(4) Damages,<br>Art. 180 PR<br>Penal Code<br>VP986445<br>Superior Court,<br>San Juan,<br>Puerto Rico | 08-23-99: Sentenced<br>to one year of<br>imprisonment as to<br>count one, two years<br>and a half of<br>imprisonment as to<br>count two, and two<br>years of<br>imprisonment as to<br>count three, to be<br>served concurrently<br>with each other.<br>Count four was<br>dismissed pursuant<br>to Rule 247(A) of<br>P.R. Criminal<br>Procedure | §4A1.1(a) | 3 |
|----|-----|-------------------------|--|--|-----------|---|

13 According to the criminal complaints, on  
 14 November 22, 1998, in Río Piedras, Puerto Rico,  
 15 Luis F. López Birriel used violence or force  
 16 against two state police officers, namely  
 17 Francisco Rivera-Velázquez, badge #23526, and  
 18 Javier Rivera Vélez, badge #24771. During the  
 19 commission of this offense he was found in  
 20 possession of and carried a Model 5906 Smith &  
 21 Wesson pistol, series VCT3860. The defendant  
 22 was represented by counsel during the court  
 23 proceedings.

Criminal No. 05-167 (JAF)

-4-

The police arrest report filed under complaint number 98-1-362-06074, further reflects that on November 22, 1998, Agents Francisco Rivera-Velázquez, badge #23526, and Javier Rivera Vélez, badge #24771, informed that on that same date Luis F. López Birriel fired various shots at them with a firearm.

|   |     |          |                 |                     |            |
|---|-----|----------|-----------------|---------------------|------------|
| 8 | 25. | 01-20-99 | Receipt of      | 06-01-99: Pled      | \$4A1.2(a) |
|   |     | Age: 34  | Stolen Goods    | guilty.             | (2)        |
|   |     |          | Cr. No.         | 08-23-99: Sentenced |            |
|   |     |          | KPD99M0074      | to six months       |            |
|   |     |          | Superior Court, | imprisonment, to be |            |
|   |     |          | San Juan,       | served concurrently |            |
|   |     |          | Puerto Rico     | with any other      | 0          |
|   |     |          |                 | sentence imposed by |            |
|   |     |          |                 | the court on this   |            |
|   |     |          |                 | date.               |            |

According to the criminal complaint, on or about July 13 - 16, 1998, in the Monte Hatillo Precinct in Río Piedras, Puerto Rico, Luis López Birriel retained, disposed, transported and received a Model 5906 Smith & Wesson pistol, series VCT-3860, which belonged to the Police of Puerto Rico, knowing that the same had been unlawfully acquired by means of illegal appropriation. On January 20, 1999, probable cause was found as a misdemeanor.

The police arrest report filed under complaint number 98-8-316-03345, further reflects that Luis López Birriel was arrested on November 22, 1998, by agents from the Puerto Rico Police Department, Monte Hatillo Precinct, as he had attempted against the lives of Agents Francisco Rivera, badge #23526, and Javier Rivera #24771, of the above-mentioned precinct. The defendant was charged with the attempt and other charges in relation to the Puerto Rico Weapons Law.

A police report for Type I crimes, filed under the same complaint, disclosed that during the period of July 13 to 16, 1998, an unknown person gained access to the evidence room of the Carolina Oeste Precinct and appropriated two pistols. One of them was a 9mm Smith & Wesson pistol, series VCT-3860, with a 15 round magazine, assigned to a female agent who was under maternity leave."

Therefore, the **Criminal History Computation** in page 6 of the PSR should read as follows:

Criminal No. 05-167 (JAF)

-5-

1       26. The total of the criminal history points is 9. According to the  
2       sentencing table (Chapter 5, Part A), 7 to 9 criminal history  
3       points establish a criminal history category of IV.

4       As a consequence of the above-mentioned, the Guideline  
5       Provisions (page 7) as to **PART C. SENTENCING OPTIONS** would remain as  
6       originally calculated by the probation officer.

7       The Probation Department will make the necessary corrections in  
8       the PSR, noting that the issue of the correctness of the Criminal  
9       History Category calculation was raised by Defendant in his Fed. R.  
10      Crim. P. 35(a) motion of February 13, 2006, Docket Document No. 67.

11      It should be noted further that there is no need for a resentencing  
12      hearing because the sentence remains the same.

13               **IT IS SO ORDERED.**

14      San Juan, Puerto Rico, this 8<sup>th</sup> day of March, 2006.

15                               S/José Antonio Fusté  
16                               JOSE ANTONIO FUSTE  
17                               Chief U. S. District Judge